



DEPARTMENT OF THE ARMY
HEADQUARTERS UNITED STATES ARMY FORCES COMMAND
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REPLY TO
ATTENTION OF

AFLG-PRO

30 Nov 99

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 00-04, Sustained Protest for Support Services for Camp Doha, Kuwait

1. We provide the enclosed sustained protest that discusses a challenge to the validity of a source selection decision where the selection official chose the awardee's technically equal, higher cost proposal based on his conclusion that the protester's lower proposed costs were not reliable (in the SSA's view, they either would increase over time or would reflect reduction in quality of services provided). The selection decision was not adequately documented under the revised Part 15 Federal Acquisition Regulation requirements that documentation of tradeoff decisions include the benefits associated with additional costs, the decision was improperly based on proposed, rather than evaluated costs, because the agency did not perform a cost realism analysis of final costs, and the concerns raised by the selection official about the protester's costs were shown during a hearing to be unsupported by the facts in the record.

2. For additional information, please contact Irene Hamm
hammi@forscom.army.mil or 404/464-5632.

A handwritten signature in black ink, appearing to read "Toni M. Gaines", is positioned above the typed name.

Encl

TONI M. GAINES
Chief, Contracting Div, DCSLOG
Principal Assistant Responsible
for Contracting

**ITT Federal Services International Corporation, B-283307; B-283307.2,
November 3, 1999**

**File: B-283307; B-283307.2
Date: November 3, 1999**

DIGEST

Protest challenging the validity of a source selection decision where the selection official chose the awardee's technically equal, higher cost proposal based on his conclusion that the protester's lower proposed costs were not reliable (in the SSA's view, they either would increase over time or would reflect reduction in quality of services provided), is sustained where (1) the selection decision is not adequately documented under the revised Part 15 Federal Acquisition Regulation requirements that documentation of tradeoff decisions include the benefits associated with additional costs; (2) the decision is improperly based on proposed, rather than evaluated, costs, because the agency did not perform a cost realism analysis of final costs; and (3) the concerns raised by the selection official about the protester's costs were shown during a hearing to be unsupported by the facts in the record.

DECISION

ITT Federal Services International Corporation protested the award of a contract to Combat Support Associates (CSA) by the Department of the Army, pursuant to request for proposals (RFP) No. DASA02-98-R-5000, issued to procure base operations and combat support at Camp Doha, Kuwait. ITT argued that the Army's selection of CSA was unreasonable and violated the terms of the solicitation because CSA's and ITT's proposals were essentially equal technically, while CSA's costs were significantly higher than ITT's costs. In addition, ITT argued that the Army's evaluation of past performance was unreasonable.

Protest Sustained

BACKGROUND

Camp Doha, Kuwait, is a large logistics base located 20 miles west of Kuwait City that serves as the Army's forward presence in the Middle East. Camp Doha has a working population of over 2,000 personnel including U.S. military personnel, as well as U.S., Kuwaiti, and third-country national contractor personnel. The RFP, for Camp Doha's base operations and management support services, was issued October 30, 1998, and anticipated award of a cost-plus-award-fee contract for a base year, followed by nine 1-year options. Among other things, the contractor is required to provide and maintain supplies and equipment for military exercises, and for contingency and combat operations, including heavy combat vehicles, tactical vehicles, and related armaments, ammunition, electronics and repair parts.

The RFP's evaluation scheme advised that award would be made to the offeror whose proposal represented the best overall value to the government. To determine which proposal offered the best value, the RFP identified three evaluation factors, in descending order of importance: quality (also referred to in the record as technical), past performance, and cost. Under the quality and past performance evaluation factors, the RFP identified sub factors, elements, and sub elements; however, most of these details are not

relevant to this decision and are set forth below only as needed. With respect to proposed costs, the RFP advised that the government would calculate a most probable cost (MPC) estimate for each proposal. In addition, offerors were advised that the "degree of importance of the Cost/Price factor would increase as the quality differences in the proposals decrease."

The Army received four proposals in response to the RFP, and evaluated each under the factors of quality and past performance. [1] Under these factors, each of the initial proposals received an adjectival rating and point score on the following scale: outstanding, 93-100 points; good, 85-92 points; fair, 78-84 points; poor, 70-77 points; and unacceptable, 0-70 points. In addition, the agency evaluated each offeror's proposed costs and calculated an MPC estimate for each proposal. Also, because each offeror had a different understanding of the solicitation's requirement for contractor-acquired property (CAP), the agency elected to evaluate proposed costs both with and without CAP costs. [2] At the conclusion of the initial evaluation, all four proposals were included in the competitive range, discussions were conducted, and each offeror was asked to submit a final revised proposal. Upon receipt of the final revised proposals (referred to at most points in the record--and hence in this decision--as best and final offers (BAFOs)), the Army reevaluated each proposal under the quality and past performance evaluation factors. The agency did not; however, calculate a BAFO MPC estimate for the proposals. The final overall scores and cost information for all the offerors are set forth below:

	CSA	ITT	Offeror Blue	Offeror Yellow
Overall Score	Outstanding Deleted	Outstanding Deleted	Fair Deleted	Good Deleted
Initial Proposed Costs	Deleted	Deleted	Deleted	Deleted
MPC w/CAP	Deleted	Deleted	Deleted	Deleted
MPC/w/o CAP	Deleted	Deleted	Deleted	Deleted
BAFO w/CAP	Deleted	Deleted	Deleted	Deleted
Change from Initial to BAFO w/CAP	Deleted	Deleted	Deleted	Deleted
BAFO w/o CAP	Deleted	Deleted	Deleted	Deleted

On June 18, the KO and several members of the evaluation team provided the source selection authority (SSA) with a briefing on the results of the competition. In addition to the briefing slides, the SSA was presented with two proposed source selection statements--one selecting CSA, one selecting ITT. The SSA did not make his selection decision at the end of the June 18 briefing, but instead left the meeting and considered his decision for several days. During that time, he sought additional information from Army staff regarding the cost of the current contract, and studied the briefing slides, the alternate selection statements, and a list of the strengths and

weaknesses of the offerors that he also took from the briefing. At a hearing convened by GAO to consider this protest, the SSA testified that he eventually concluded that CSA had the best technical proposal, and a realistic MPC estimate. On June 29, the SSA selected CSA for award, and signed the selection statement provided during the briefing 11 days earlier, without making substantive changes to its text. With respect to ITT, the selection decision states: ITT's overall quality proposal was outstanding and was determined to be technically equal to CSA. However, ITT's MPC without CAP at [deleted] was lower than both CSA and Yellow. ITT's revised proposal lowered proposed costs which was of concern since as [sic] ITT's cost pricing discussion were [sic] mainly centered on items (to include apparent non compliance with a portion of Kuwait Labor Law) that should have increased costs. ITT's proposal also offered no significant weaknesses and no performance risks. With respect to CSA, the selection statement indicated that CSA was the only offeror whose proposal was outstanding in both quality and past performance, [3] that the technical proposal was detailed and included an excellent analysis of the contract's requirements, that CSA's proposed costs were reasonable, and, that the quality of the CSA proposal outweighed its higher cost. Thus, the SSA selected CSA for award, and these protests followed.

ITT'S CHALLENGE TO THE SELECTION DECISION

ITT argued that the SSA did not have a reasonable basis for selecting CSA's significantly higher-cost proposal over ITT's, given the SSA's finding that the two proposals were technically equal. [4] ITT complained that: (1) the SSA's concern about ITT's costs is not reflected in the underlying cost analysis materials; (2) the Selection Statement failed to identify any particular technical differences that might have merited the cost difference between the proposals; and, (3) the SSA wrongly concluded that ITT's BAFO costs should have increased, rather than decreased, as a result of discussions. The Army disputed each of ITT's contentions about the selection decision here, even though the SSA readily admits that many of his concerns were not reflected in the decision document he signed. The Army responded, however, that the basic principle underlying the decision was identified by the Selection Statement--i.e., that the SSA considered ITT's costs to be too low, and that he expected ITT's BAFO costs to increase, rather than decrease, as a result of the issues covered during discussions, including the requirement for compliance with Kuwaiti labor law.

Before turning to a substantive analysis of the SSA's reasons for selecting CSA over ITT, GAO first addressed a series of threshold issues raised by the parties and the record. First, given the relative paucity of analysis in the Selection Statement, the Army sought consideration of additional materials and testimony to further explain the selection decision; ITT argued that this supplemental information should be given little weight in GAO's review. Indeed, ITT argued that GAO should uphold its protest based on the Army's failure to adequately document the selection decision. Finally, the GAO also considered the impact on the selection decision of the evaluation team's failure to calculate an MPC estimate for ITT's BAFO. Supplemental Materials and Testimony To buttress the written Selection Statement, the Army urged GAO to consider information found in: (1) a price negotiation memorandum prepared by the contracting officer 1 day after the selection decision; (2) a declaration from the SSA, dated August 18, 1999, provided to the protester as part of the agency's document production; and (3) testimony from the SSA at a hearing before GAO on October 5, 1999, in which the SSA further explained his rationale for the selection decision. ITT responded that GAO's review should

be limited to the Selection Statement itself, and that GAO's holding in Boeing Sikorsky Aircraft Support, B-277263, B-277263.2, September 29, 1997, 97-2 CPD ¶ 91, bars consideration of any of these other materials. As set forth below, GAO concluded that, in most areas, ITT misread GAO's decision in Boeing, although GAO agreed that Boeing did control their consideration of a hypothetical redetermination of the award decision offered by the Army during the course of this protest.

The GAO decision in Boeing involved an agency's post-protest hypothetical cost/technical tradeoff presented to demonstrate a lack of prejudice from any alleged agency errors. Prejudice to the protester is critical to our decision making, since GAO will not sustain a protest unless the protester demonstrates a reasonable possibility of prejudice, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, February 8, 1996, 96-1 CPD ¶ 54 at 3; see *Statistica, Inc. v. Christopher*, 102 F.3d 1577, 1581 (Fed. Cir. 1996). In responding to Boeing's challenges to the propriety of the technical and cost evaluations, the agency there answered that even if Boeing were to prevail on its protest grounds it would still not be awarded the contract because of the awardee's superior management evaluation. In this regard, the agency submitted a new cost/technical tradeoff analysis prepared during the pendency of the protest, which assumes the validity of many of Boeing's allegations, but concluded that the award decision would not change. Boeing Sikorsky Aircraft Support, *supra*, at 14. In deciding what weight to accord the agency's reevaluation, GAO held that "[w]hile we consider the entire record, . . . we accorded greater weight to contemporaneous source selection materials rather than judgments, such as the selection officials' reevaluation here, made in response to protest contentions." GAO further reasoned that the "lesser weight that we accorded these post-protest documents reflected the concern that, because they constitute reevaluations and redeterminations prepared in the heat of an adversarial process, they may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process." A counterpoint to Boeing is our decision in *NWT, Inc.; PharmChem Labs., Inc.*, B-280988, B-280988.2, December 17, 1998, 98-2 CPD ¶ 158, where we distinguished post-protest reevaluation and redetermination from memorialization of contemporaneous analysis. In *NWT; PharmChem*, GAO stated that "[p]ost-protest explanations that provide a detailed rationale for contemporaneous conclusions, as is the case here, simply fill in previously unrecorded details, and will generally be considered in our review of the rationality of selection decisions, so long as those explanations are credible and consistent with the contemporaneous record." In analyzing the challenged documents and testimony in the instant protest within the context of Boeing and *NWT; PharmChem*, the easiest document to address was the negotiation memorandum prepared the day after the SSA signed the Selection Statement. Of relevance here, this document contained a contemporaneous recitation of the Army's understanding of the reasons ITT lowered its BAFO costs, and reflected the same concern as the Selection Statement regarding the fact that ITT's BAFO costs went down rather than up. Since this document is, in effect, contemporaneous, and was not prepared in the "heat of the adversarial process," GAO had none of the concerns expressed in Boeing. With respect to the SSA's declaration prepared in response to the protest, GAO viewed the bulk of the information here as similar to the statements at issue in *NWT; PharmChem*. The declaration addressed the lapse of time between the selection briefing and the date on the decision document, and provided information regarding the contemporaneous

concerns of the SSA. Specifically, the SSA recounted his concern about the drop in ITT's BAFO costs against the backdrop of an orientation briefing he received at Camp Doha in August 1998, where he was advised that the new contractor would have to add aviation support services not currently contained in the contract, and begin complying with Kuwaiti labor law. Declaration of Maj. Gen. Robert D. Shadley, August 18, 1999. Thus, he stated that he was concerned that ITT's drop in proposed costs meant that it "intended to either reduce the quality of the services to be provided, or to seek a contract price increase after award." This information was consistent with the written Selection Statement, and in GAO's view, constituted further explanation of the SSA's contemporaneous thought process, not memorialized there. [5]

Consistent with GAO's approach to the SSA's declaration, GAO convened a hearing in this protest to further explore the SSA's rationale for his decision. As in NWT; PharmChem, GAO concluded that the SSA's testimony was credible and generally consistent with the underlying evaluation materials and the Selection Statement. Notwithstanding the SSA's credibility; however, GAO concluded, for the reasons set forth below, that the selection of CSA over ITT lacked a reasonable basis.

ITT contended that the selection decision document here was inadequate, on its face to support the cost/technical tradeoff it purported to make. Where a cost/technical tradeoff is made, the selection decision must be documented, and the documentation must include the rationale for any tradeoffs made, "including benefits associated with additional costs." Federal Acquisition Regulation (FAR) § 15.308; Opti-Lite Optical, B-281693, March 22, 1999, 99-1 CPD ¶ 61. The FAR language quoted above, requiring identification of the benefits associated with a decision to pay additional costs, was added by the recent rewrite of Part 15 of the FAR and became effective January 1, 1998, thus it applies here. The earlier language, FAR 15.612(d)(2) (June 1997), required only that the documentation include the basis and reasons for the selection decision. The selection decision document here failed to meet the standard set forth in the FAR for explaining the rationale for tradeoffs that lead to incurring of additional costs. As quoted above, the document first concluded that overall the proposals were technically equal, then that CSA's costs were reasonable, and that the quality of CSA's proposal outweighed its higher cost. Not only are these findings inconsistent, but there was no explanation of the benefits associated with the allegedly higher costs of the CSA proposal.

The GAO had a second concern about the adequacy of the selection decision here that transcended any of the specific arguments raised by the protester--although the concern is best illustrated by a quick review of one of ITT's contentions. Specifically, ITT argued in its supplemental protest that the selection decision lacked a rational basis because the decision, in effect, rejected ITT's proposal after concluding that its costs were not realistic. ITT argued that the SSA had no reasonable basis for this conclusion since the cost review team raised no concerns about ITT's proposed BAFO costs. The Army responded, and GAO agreed, that the lack of stated concerns by the cost team did not bar the SSA from reaching his own--and different--conclusions, so long as those conclusions have a rational basis. Loral Aeronutronic, B-259857.2, B-259858.2, July 5, 1995, 95-2 CPD ¶ 213. GAO's review of this issue; however, revealed a more serious matter than simply adding new concerns to those of the evaluators. At no point in this record did the cost evaluators prepare a probable cost estimate for ITT's BAFO--which dropped

more than \$[deleted] from its initial proposed costs. Instead, all of the evaluation materials include only the MPC estimates calculated for the initial proposals. When an agency evaluates a proposal for the award of a cost reimbursement contract, an offeror's proposed estimated costs are not dispositive, because regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs. FAR 15.305(a)(1); 15.404-1(d). Consequently, a cost realism analysis must be performed by the agency to determine the extent to which an offeror's proposed costs represent what the contract should cost, assuming reasonable economy and efficiency. FAR 15.404-1(d)(2); CACI, Inc.-Fed., B-216516, November 19, 1984, 84-2 CPD ¶ 542 at 5. In addition, the recent rewrite of Part 15 of the FAR now expressly provides that "[t]he probable cost shall be used for purposes of evaluation to determine the best value." FAR 15.404-1(d)(2)(i). Here, having been provided with no probable cost for ITT's BAFO, [6] the SSA had only two choices: rely on the most probable cost calculated for the initial proposals--prepared before ITT reduced its proposed costs by \$[deleted] in its BAFO--or compare the offerors' unevaluated proposed BAFO costs, which are not dispositive of the costs the government will be bound to pay. Neither approach yielded a reasonable best value comparison based on a valid cost realism analysis, given the significant changes made in BAFO costs by ITT and others. Thus, the SSA's conclusions--whether included in the selection statement, or found in any of the supplemental materials generated before or during this protest--were improperly based on comparisons of either initial MPC estimates, or unevaluated BAFO costs. This error reverberated throughout the analysis below.

Analysis of the SSA's Specific Concerns

With respect to the specific concerns outlined by the SSA, GAO noted first his view, memorialized in the written selection decision, that ITT's compliance with Kuwaiti labor law would cause its BAFO costs to increase, not decrease. This concern was broadened during the course of this protest. While the selection decision focused on the drop in ITT's BAFO cost from its initial proposed cost, the SSA stated in the hearing and in the Army's pleadings, that he also believed compliance with Kuwaiti labor law would cause ITT's costs to be higher than the costs of the last year of the previous contract. The SSA further explained that he believed costs should be higher than in the last year of the previous contract because the current procurement added aviation support services to the workload. All three issued are addressed below.

Regarding the issue of Kuwaiti labor law, there was no dispute among the parties that the previous contract for base operations at Camp Doha did not require that all contract employees be paid in accordance with Kuwaiti labor law, and that the new contract does. For purposes of this dispute, the Army explained that the relevant Kuwaiti laws limit the workday to 8 hours, limit the workweek to 48 hours, limit overtime to 2 hours a day, and limit annual overtime to 180 hours; in addition, the laws require overtime compensation of at least 25 percent above the normal wage. Memorandum of Law, Dept. of the Army, Sept. 16, 1999. As the incumbent contractor, ITT, until recently, had been allowed not to pay overtime to certain of its on-site American salaried professional employees. With respect to the drop in its BAFO costs, ITT vigorously disputed that compliance with Kuwaiti labor law was a factor in estimating costs for its BAFO. Instead, ITT argued that it understood from the beginning of this procurement the Army's intent to require that all contract employees be covered by Kuwaiti labor law. GAO's review of the

record showed that ITT's intent to comply was set forth on the first page of its initial cost proposal, which stated: This proposal has been priced in accordance with Kuwaiti labor law. As such, all employees will be compensated at (1.25 x base salary) for every hour worked over the basic 48-hour workweek. During discussions, ITT was asked to reconfirm its understanding of this issue after its representative, during the course of ITT's oral presentation, stated that all of ITT's third country nationals would be paid in accordance with Kuwaiti labor law. ITT did so, and there was no further evidence in the underlying evaluation record of any concern about ITT's compliance with this requirement. Accordingly, GAO concluded that the SSA's concern that ITT's compliance with Kuwaiti labor law should have increased its BAFO costs was unfounded, and cannot reasonably support the selection decision here.

With respect to whether ITT's costs should have been higher in its proposal than they were in the last year of its previous contract, this concern is first set forth in a declaration prepared by the SSA, and filed with the initial agency report. Therein, the SSA explained that he asked for, and was provided, the past 5 years of costs for this effort. Declaration of Maj. Gen. Shadley. The table below identifies the previous cost information provided to the SSA:

	Cost (with CAP)	Cost (without CAP)
Base Year	[deleted]	[deleted]
First Option Year	[deleted]	[deleted]
Second Option Year	[deleted]	[deleted]
Third Option Year	[deleted]	[deleted]
Fourth Option Year (most recent year)	[deleted]	[deleted]

Using this information, the SSA divided ITT's proposed BAFO costs by 10--as the instant procurement anticipates a 10-year performance period--and concluded that ITT's proposed costs were approximately \$[deleted] lower than in the last year of the previous contract [7] Declaration of Maj. Gen. Shadley. GAO's review of this analysis raised several questions. First, while GAO saw nothing unreasonable about the SSA's belief that requiring compliance with Kuwaiti labor law should increase personnel costs above those in the previous contract, [8] this analysis, applied to all of the competitive range offerors, showed that all of them estimated their BAFO proposed costs (with CAP) significantly lower than the cost experienced in the last year of the previous contract. While ITT is approximately \$[deleted] lower annually than the previous contract, CSA was \$[deleted] lower, Offeror "Blue" was almost \$[deleted] lower, and even the highest-cost offeror (Yellow) was \$[deleted] lower. Given this range of lowered costs, it was hard to understand why this analysis led the SSA to "conclude that [ITT] did not have a firm understanding of the Government's requirements," Declaration of Maj. Gen. Shadley, supra, while CSA's proposed costs did not. [9] In short, the record showed that regardless of the agency's credible expectation that offerors would propose increased costs compared to the last year of the previous contract, in fact, none of them did; and, to date, there is nothing in the record to support a reasonable conclusion that ITT's failure to propose higher costs than last year raises any issue not raised by the other proposals. The SSA's concerns discussed above are also undercut by the fact that they are based on proposed, not evaluated, costs. This error particularly infected the SSA's comparison of BAFO costs with the last year of contract performance, as illustrated below. ITT's initial proposed costs

with CAP were adjusted upwards by more than \$[deleted] by the Army's cost evaluators. While GAO has no way of knowing the amount of the adjustment that should be applied to ITT's BAFO, if the same adjustment were applied as was applied to ITT's initial proposal, ITT's annual comparative costs would be approximately \$[deleted] below the cost of the last year of the previous contract, rather than \$[deleted], as the SSA calculated. Given the SSA's apparent comfort with CSA's proposed costs with CAP (which were \$[deleted] lower than the last year of the previous contract), the use of adjusted costs for ITT could well have alleviated his concern. [10] The third specific concern raised by the SSA was his understanding that aviation support services would be added to the Camp Doha workload by this RFP, and that such services were not included in the earlier contract. Declaration of Maj. Gen. Shadley. ITT disputed the SSA's understanding about aviation support services and claimed that the services were, in fact, added to its earlier contract in late 1998--after the SSA's visit to and briefing at Camp Doha. In GAO's view, the dispute between ITT and the Army over the amount of aviation support services that were included in the last year of the previous contract were largely immaterial. As discussed above with respect to the new requirement for full compliance with Kuwaiti labor law, the record showed that none of the four offerors proposed annual costs--using the analysis adopted by the SSA here--that were higher than the last year of the previous contract. Given that all of the offerors proposed lower costs, that there was [deleted] between the annual costs proposed by ITT and CSA, and that the Army improperly used unadjusted cost figures to make these comparisons, there was nothing in this record to support the selection of CSA's proposal over ITT's in a best value tradeoff decision because aviation support services have been added to this workload.

A more general concern raised by the SSA in his declaration and again at the hearing, was that ITT's proposed BAFO costs were simply too low to ensure successful contract performance. In his words, ITT's low cost meant that the company "intended to either reduce the quality of services to be provided, or to seek a contract price increase after award. Either of these eventualities was unacceptable." Declaration of Maj. Gen. Shadley. Supplementing this concern, the SSA explained that cost growth would be problematic because the Kuwaiti government was reimbursing the Army for the cost of this contract. Specifically, the SSA stated that allowing "an increase in the contract price following a binding price agreement" would cause strains in U.S.-Kuwaiti relations. With respect to whether ITT's BAFO costs were simply too low to support the quality of services the Army was seeking, GAO noted that ITT's proposal contained a performance approach that the Army's evaluators termed outstanding overall. The purpose of a cost realism review was to ensure that the costs of delivering an offeror's proposed approach are accurately reflected in the cost proposal. FAR 15.404-1(d); AmerInd, Inc., B-248324, Aug. 6, 1992, 92-2 CPD. Without an underlying review of probable costs, and without specific enumerated concerns about why the proposed costs were too low, the SSA's general concern about ITT's costs provided no basis, under these circumstances, for rejecting the ITT proposal. See FAR 15.308, 15.404-1(d)(2)(i). In addition, while GAO fully accept the validity of the SSA's concerns about the problems that might arise in U.S.-Kuwaiti relations over increasing costs for these services, the selection decision in this record did not rationally advance these interests. First, GAO noted that notwithstanding the SSA's anticipation of a "binding price agreement," this was a cost reimbursement contract--there would be no binding price agreement. Instead, the SSA's concerns seem to be that BAFO proposed costs were not realistic. In this regard, CSA's initial proposed costs of \$[deleted] were

adjusted upwards significantly in the MPC estimate prepared by the Army's evaluators--to \$[deleted] with CAP (an increase of \$[deleted]), and to \$[deleted] without CAP (an increase of \$[deleted]). On the other hand, ITT's initial proposed costs of \$[deleted] were adjusted to \$[deleted] with CAP (an increase of \$[deleted]) and to \$[deleted] without CAP (a decrease of \$[deleted]). Thus, the Army's own analysis indicated that CSA's proposed costs were likely to increase by a larger amount than ITT's. Moreover, the record here suggested that if the analysis of initial proposals was valid, the changes to ITT's BAFO should not alter the conclusion that CSA's proposal was more likely to experience cost growth than ITT's proposal. In this regard, if the Army were to conclude that every dollar by which ITT reduced its BAFO costs should be rejected as unrealistic (and thus returned to ITT's initial MPC estimate), ITT's most probable BAFO costs would remain unchanged from its initial evaluated costs (and significantly lower than those of CSA), and its proposed costs would still be adjusted by a smaller amount than would CSA's. [11]

PAST PERFORMANCE

ITT argued that the Army's evaluation of past performance was unreasonable and should be overturned. Specifically, ITT contended that: (1) CSA should not have received an outstanding rating under the past performance evaluation factor because CSA is a new joint venture composed of several entities who have never performed together; (2) the good rating given ITT was unreasonable because, among other reasons, ITT's performance of the predecessor contract here has been excellent; and (3) the Army was required to discuss with ITT the adverse information that caused its past performance to be assessed as good, rather than outstanding. The Army disputed each of these arguments. The past performance evaluation factor identified five sub factors, in descending order of importance: quality of performance, timeliness, cost control, business relations, and customer satisfaction. Each of these sub factors were identified as separate scoring criteria on the Contractor Past Performance Evaluation Report used by an offeror's past performance references to rate the contractor's performance. The individuals completing this report were asked to rate each of these five scoring criteria on a scale of 1 to 5, as follows: 1, unsatisfactory; 2, marginal; 3, satisfactory; 4, very good; and 5, exceptional. These ratings were reviewed by the agency evaluators, who then assigned ratings consistent with the evaluation scheme used to assess quality--i.e., outstanding, 93-100 points; good, 85-92 points; fair, 78-84 points; poor, 70-77 points; and unacceptable, 0-70 points. At the conclusion of evaluations here ITT received an overall past performance score of 92 (good), while CSA received a past performance score of 94 (outstanding). With respect to ITT's contention that CSA could not reasonably be given a score of outstanding because of its status as a new joint venture, GAO disagreed. The evaluation record showed that the evaluators were well aware of CSA's status as a joint venture, and aware that the various entities that comprise CSA had not all worked together previously. To address their concerns, the evaluators sought legal guidance on evaluating joint ventures, which was provided in the form of a memorandum, and included as part of the agency report. In particular, the evaluators were pointed to prior decisions by GAO holding that they could appropriately consider the experience of the joint venture's individual teaming members, and at the same time, consider the lack of experience of the joint venture itself. E.g., Global Eng'g & Constr. Joint Venture, B-275999.4, B-275999.5, October 6, 1997, 97-2 CPD ¶ 125 at 9. In the final analysis--and using the guidance on evaluating joint ventures that had been provided to them--the evaluators noted that the majority of the joint venture members had

outstanding past performance references and that the majority partner specialized in joint ventures, while noting some risk for one minority joint venture partner who had not previously worked as part of a joint venture. Accordingly, the evaluators assigned CSA a rating of 94, which they considered a "low outstanding rating." In GAO's view, there was nothing about this analysis that was unreasonable, and ITT's mere disagreement with these conclusions did not make them wrong. UNICCO Gov't Servs., Inc., B-277658, Nov. 7, 1997, 97-2 CPD ¶ 134. ITT also contended that the Army improperly assigned its proposal a rating of 92 (good), and acted improperly in failing to advise ITT of this rating during discussions. ITT received its rating of 92--one point short of an outstanding rating--because two of its past performance references rated ITT as [deleted] by giving the company a rating of [deleted] under certain criteria on the 1 to 5 rating scale established on the Contractor Past Performance Evaluation Report.

In addition, ITT's references provided two comments that ITT argued were adverse. These were that: (1) on a similar contract, ITT had experienced [deleted] in 1998; and, (2) on the previous [deleted] contract, there may have been some issues of [deleted]. With respect to whether the evaluation rating was reasonable, ITT argued that the evaluators misunderstood the underlying comments, and interpreted them to mean that ITT was responsible for causing [deleted]. In fact, the record clearly reflected the panel's recognition that the source of the problems may have been the Army, not ITT. Specifically, the consensus report prepared on ITT's past performance noted with respect to the cost sub factor that [deleted]. In GAO's view, these materials clearly indicated that the evaluators were making an informed judgment about ITT's role in the [deleted] issue, and together with the knowledge of the [deleted] also mentioned, the evaluators nonetheless assigned ITT a score of [deleted] under the cost control sub factor. Nothing in this record showed that this rating was unreasonable, or based on a failure to properly understand the underlying reference responses. With respect to the adequacy of discussions, ITT argued that its receipt of scores of good from some evaluators, together with the arguably adverse information regarding a 1998 [deleted] on one of its contracts and the general question of [deleted] contract, had to be raised during discussions. In response, the Army provided a declaration from the contracting officer in which she stated that she considered raising these two issues, but did not because I did not consider the matter to reflect a significant weakness which ITT could improve to enhance its chances for award. Further, I did not believe that ITT could say anything to dispute the [deleted]--it either happened or it didn't. Declaration of Bette Jean S. Kinsey. ITT's contention that the Army was required to raise these matters during discussions was initially based on FAR 15.610(c)(6) (June 1997)--a regulatory provision that ITT now acknowledges was removed from the FAR prior to the issuance of this solicitation. The new revised FAR part 15 provision governing discussions no longer contains the provision upon which ITT relied. Instead, the new provision provides, in relevant part, that contracting officers shall indicate to, or discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. FAR 15.306(d)(3). As it indicates on its face, this provision applies to past performance information. See MCR Fed., Inc., B-280969, Dec. 14, 1998, 99-1 CPD ¶ 8 at 11 n.11. In addition, GAO saw nothing unreasonable about the contracting officer's determination that she need not raise with ITT during discussions

the generally very favorable past performance information she received from the references. First, some of the information was that ITT was simply good, rather than outstanding. With respect to the comments about the [deleted] and the [deleted] concern, the [deleted] information was largely factual, while the [deleted] comment was ambiguous and not clearly negative. In addition, both comments were made in evaluating a sub factor for which ITT was evaluated as outstanding. Under these circumstances, and given that decisions like these are made during the course of the procurement (and before it can be known that the two offerors will end up with almost identical overall scores), GAO concluded the contracting officer reasonably decided that ITT's overall past performance rating of good did not contain the kind of significant weakness or "other aspects" that could be addressed to improve materially ITT's potential for award.

RECOMMENDATION

The GAO recommended that the Army reopen the procurement, and reevaluate the BAFO cost proposals submitted--to include an appropriate cost realism analysis pursuant to FAR 15.404-1(d) and calculation of a BAFO MPC estimate for those offerors who revised their proposed costs in their BAFOs, in accordance with the stated evaluation scheme. GAO also recommended that the agency perform a new best value determination. If, after reevaluation, CSA's proposal did not represent the best value to the government, GAO recommended that the agency terminate the award to CSA, and award to the offeror whose proposal presents the best value under the evaluation scheme. GAO also recommended that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1999). In accordance with 4 C.F.R. 21.8(f)(1), ITT's certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

Protest sustained.

Notes

1. The Army opted to assign each offeror's proposal a color code; this color code appears throughout the evaluation materials, rather than the offeror's actual identity. For ease of reference, this decision will refer to ITT and CSA by their names. We used the color code for the other two offerors.
2. Contractor acquired property was property purchased by the contractor for performance of the contract, which will become the property of the government at the end of contract performance.
3. Although ITT was rated outstanding overall, its underlying past performance rating was good. The SSA's statement, therefore, was observing that only CSA received a rating of outstanding on both of the underlying non-price factors.
4. As shown above, CSA's unadjusted final proposed cost (without CAP) was \$[deleted] higher than ITT's (\$[deleted] vs. \$[deleted]), and CSA's most probable cost (without CAP) from its initial proposal was \$[deleted] than ITT's (\$[deleted] vs. \$[deleted]). As also mentioned above, the only MPC estimates were those from the initial proposal, thus the comparison of most probable costs above did not include the fact that ITT lowered its proposed costs in its final revised proposal by \$[deleted].
5. There was; however, one statement in the SSA's declaration that, as with the hypothetical post-protest cost/technical tradeoff in Boeing, GAO accorded little weight. Specifically, the SSA's declaration stated that "even if the

[ITT] cost proposal were increased so that my concerns about [ITT's] understanding of our requirements were allayed, and even if the [ITT] cost proposal was less than the [CSA] cost proposal, I would still select [CSA] for award because of its superior non-price factors scores." Declaration of Maj. Gen. Shadley. As GAO has stated, "we accord little weight to agency efforts to defend, in the face of a bid protest, a prior source selection through submission of new analyses, which the agency itself views as merely hypothetical, because such reevaluations and redeterminations prepared in the heat of the adversarial process may not represent the fair and considered judgment of the agency." Possehn Consulting, B-278579.2, July 29, 1998, 98-2.

6. CSA's BAFO did not change its proposed costs, thus the MPC estimate for its initial proposal was presumably sufficient for this comparison. ITT's BAFO's proposed costs with CAP were \$[deleted]. This figure, divided by 10, yielded an annual performance cost of \$[deleted]--which was almost \$[deleted] below the cost of the last year of ITT's previous contract. In fact, the record included a letter from ITT's Project Director, written prior to this dispute, in which he admitted that full compliance with Kuwaiti labor law would result in significant cost increases. Letter from James A. Smith, Project Director, ITT, to the Contracting Officer (April 11, 1999).

9. When asked this question in a hearing before our Office, the SSA's only answer was that ITT's costs were dropped in its BAFO, while CSA's were not. GAO failed to see how the difference in timing could reasonably lead to a different conclusion about an offeror's understanding of the government's requirements.

10. This figure was calculated as follows: [deleted], which is \$[deleted] less than the \$[deleted] used for the last year of contract performance.

11. In approximate terms, rejecting every dollar of ITT's BAFO cost reduction, and thus adding \$[deleted] to the amount of the adjustments made to ITT's MPC estimates, with and without CAP, would result in an adjustment from ITT's BAFO of \$[deleted] with CAP (compared to CSA's \$[deleted] adjustment), and \$[deleted] without CAP (compared to CSA's \$[deleted] adjustment). Thus, under this analysis, CSA remains more likely to experience cost growth than ITT.